TT MARTECH SDN BHD

v.

WING CONSTRUCTION (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: D4-22-634-1996]
20 OCTOBER 2004

CONTRACT: *Assignment - Goods sold and delivered - Defendant assigning benefit of contract with third party to plaintiff to pay for goods sold and delivered - Contract terminated by third party - Liability for sums outstanding on goods sold and delivered - Whether remaining with defendant - Deed of assignment thereof - Whether relieving defendant from liability - Contracts Act 1950 s. 42*

The defendant had entered into a contract with Lembaga Pelabuhan Johor ('LPJ') by which it agreed to undertake certain works for LPJ. Thereafter, with LPJ's consent, the defendant executed a deed of assignment with the plaintiff ('the assignment') and assigned the proceeds from the contract to the plaintiff. The assignment was for payment of goods supplied by the plaintiff for use in the contract. Subsequently, LPJ terminated the contract with the defendant. LPJ, however, refused to pay the plaintiff the sum of RM386,723 that remained outstanding on goods sold and delivered to the defendant. The defendant then referred the dispute to arbitration but the same was dismissed by the arbitrator. In the meanwhile, pending the defendant's appeal thereof, the plaintiff sued the defendant for the sum owed. The defendant argued that it had been absolved from liability by the assignment, that liability to pay laid with LPJ, and that the plaintiff, rightly, ought to have waited for the outcome of the appeal before proceeding with the claim.

Held (allowing the plaintiff's claim):

[1] There was nothing in the assignment that stated that the plaintiff has agreed to accept performance solely from LPJ in respect of the payment of the goods. Likewise, there was nothing that suggested that the defendant would be released from personal liability to pay the plaintiff the price of the goods should LPJ refuse or fail to pay for them. The assignment, therefore, did not absolve the defendant from liability to pay for the goods. (p 693 d-e)

[1a] Furthermore, LJP has terminated the contract, and the assignment was henceforth frustrated and became void. That being so, the defendant was liable to pay the sum claimed to the plaintiff. (p 701 b-d)

[2] The arbitration claim as commenced by the defendant against LPJ has been dismissed. Whilst an appeal thereto was pending, the fact remained that there was no money owing or payable by LPJ to the defendant. Hence, to argue that the plaintiff must wait until the defendant has exhausted all avenues of appeal before the plaintiff could claim against the defendant for the sum due was absurd. There was no legal authority for such an argument. (p 700 c-e)

Case(s) referred to:
Chong Hee v. Credit Corporation (Malaysia) Berhad [1999] MLJ U 456 HC ***(refd)***
Housing & Urban Development Co (Pte) Ltd v. Mah Kok Weng & Anor [1984] 2 MLJ 16 SC ***(refd)***
Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 3 MLJ 164 SC ***(refd)***
United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors [1990] 1 MLJ 280 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 42

Other source(s) referred to:
Hargopal, *A Practical Guide To Legal Drafting - The Indian Draftsman*, p. 18
Jeevan Lal Kapur, *Pollock & Mulla On Indian Contract And Specific Relief Acts*, 10th edn, p. 413

For the plaintiff - Desmond KL Ng; M/s Shui-Tai
For the defendant - Ajit Kumar Hastir; M/s Watson Peters & Mohd Fuad

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

The decision in this case is handed down after a full blown trial. Briefly, the plaintiff claims from the defendant a sum of RM386,273 being the balance of the price of goods sold and delivered by the plaintiff to the defendant *vide* the plaintiff's invoice number 0332. The defendant denies liability to pay the sum as claimed by the plaintiff based on the deed of assignment dated 20 September 1989. By that deed of assignment, the defendant as the assignor unconditionally assigned absolutely to the plaintiff as the assignee monies which

is owed and payable by Lembaga Pelabuhan Johor ("LPJ") to the defendant pursuant to the contract no: LPJ/643/87 ("the said contract") to the extent of the price of the said goods.

Statement of Agreed Facts

I am fortunate that there is an agreed statement of facts by the parties. It is marked as Bundle "E" and it is dated 25 June 2002 and under it the parties agreed to the following material facts:

(1) Pursuant to a contract no: LPJ/643/87 ('the said contract') between Lembaga Pelabuhan Johor (hereinafter referred to as 'LPJ') and the defendant, the defendant was awarded by LPJ to do certain works pursuant to it.

(2) Upon the defendant's request, the plaintiff had sold and supplied goods to the defendant for the purposes of completing the said contract.

(3) The plaintiff and the defendant has executed a Deed of Assignment dated 20.9.89 ('the said Assignment') with the consent and notice to LPJ.

(4) Pursuant to the said Assignment, the defendant has, *inter alia*, unconditionally assigned absolutely to the plaintiff monies which is owed and to be paid by LPJ to the defendant pursuant to the said contract to the extent of the price of the said goods.

(5) The balance of the price of the said goods still outstanding pursuant to the plaintiff's invoice no: 0332 is RM386,273.00.

(6) The defendant pursuant to its letter dated 26.1.1991 has requested LPJ to pay the plaintiff the said sum of RM386,273.00 but LPJ has refused to do so.

(7) Instead, LPJ has pursuant to its letter dated 4 February 1991 tried to terminate the said contract with the defendant and to which the said termination is now being disputed by the defendant.

(8) LPJ has not made any payment to the plaintiff and/or the defendant after the termination of the said contract.

(9) The defendant has instituted arbitration proceedings against LPJ.

To The Heart Of The Matter

The defendant's witness by the name of Long Shin (DW1) gave a witness statement marked as DWS1 and there in answer to Question 17 he briefly stated that the said contract was in fact terminated by LPJ. Question 17 of the witness statement of Long Shin (DW1) which is regarded as his examination in chief is worded in this way:

Q17. Please refer to clause 5 of the Assignment at page 3 of the Agreed Bundle of Documents (marked as Bundle 'G'). The clause states that the defendant shall take all steps and measures that Johor Port Authority (referring to LPJ) shall make payment. What has the defendant done?

The answer to this Question 17 is as follows:

Answer: In February 1991, Johor Port Authority (referring to LPJ) terminated the defendant's contract for the project. So the defendant commenced arbitration proceedings for wrongful termination and for payment of all monies due to us and for damages as well. The defendant believes that this would also result in Johor Port Authority (referring to LPJ) paying the plaintiff directly the sum of RM386,273.00 which the plaintiff is claiming from the sums that Johor Port Authority (referring to LPJ) would have to pay to the defendant.

Events have proved that LPJ did not pay the sum of RM386,273 to the plaintiff and hence the present suit.

As far as the arbitration is concerned, the defendant has not been successful and the defendant has since appealed to the High Court. Long Shin's witness statement refers to that arbitration in this way:

Q18: Have you been successful at the arbitration?

Answer: No, but I am advised that the arbitrator erred in many respects, and so the defendant has appealed to the High Court pursuant to the Arbitration Act.

Q19: Has the High Court decided on the matter?

Answer: No. The hearing is still mid-way, and is fixed for continuation in April this year.

Under cross-examination, Long Shin (DW1) testified to the following salient points:

(a) that the goods as stated in the invoice number 0332 were ordered and purchased by the defendant from the plaintiff;

(b) that the said goods were not ordered by LPJ; and

(c) that the defendant's claim for monies and damages in the arbitration proceedings commenced by it against LPJ has been dismissed by the arbitrator.

The plaintiff's sole witness by the name of Lai Pock Long ("Lai") is an internal auditor for the Li & Fung group of companies wherein the plaintiff is said to be an associate company of the group. In his witness statement marked as PWS1, Lai (PW1) testified by way of an examination in chief as follows (the relevant parts only):

6. Question: What is the plaintiff's claim in this suit?

Answer: The plaintiff's claim herein is against the defendant for the said sum of RM386,273.00, being the balance of the price of the goods sold and delivered by the plaintiff to the defendant.

8. Question: What is the purpose of this assignment?

Answer: The purpose is clearly stated in Recital (3) of the Assignment i.e. to secure the payment for the goods supplied by the plaintiff to the defendant.

9. Question: Did the plaintiff ever agree to release the defendant of its obligations to pay the plaintiff for the goods in the event that LPJ does not pay?

Answer: No.

15. Question: Did LPJ pay the said sum of RM386,273.00 on behalf of the defendant?

Answer: No.

16. Question: Do you know why LPJ did not pay the plaintiff the said sum?

Answer: Yes. This is because LPJ has terminated the principal contract with the defendant.

Under cross-examination, Lai (PW1) was put this pertinent question:

Put: There is an assignment in Bundle 'G'. What the plaintiff ought to be doing is suing LPJ for the money because the monies receivable by the defendant has been assigned absolutely to the plaintiff and the plaintiff ought to be suing LPJ for the money since at page 1 and page 2 of Bundle 'H', LPJ had consented to the assignment?

A: I am not sure.

Under re-examination, Lai (PW1) testified as follows:

Q: From the documents kept by the plaintiff have you found any document that shows that the plaintiff has released the defendant from paying in the event LPJ does not pay the plaintiff directly?

A: No.

Q: Do you agree that it is the duty of the plaintiff to claim the sum of RM386,273.00 directly from LPJ?

A: I do not agree.

The Sting Of The Assignment

The agreed statement of facts indicate that pursuant to the said assignment – referring to the deed of assignment, the defendant has, *inter alia*, unconditionally assigned absolutely to the plaintiff monies which is owed and to be paid by LPJ to the defendant pursuant to the said contract to the extent of the price of the said goods. But according to Lai (PW1), the plaintiff has not released the defendant from paying in the event LPJ fails to pay the plaintiff directly. This is exactly what happens here. LPJ has not paid the plaintiff and so the plaintiff sues the defendant because the plaintiff had sold and supplied those goods to the defendant. In fact, the plaintiff has delivered the goods to the defendant at its request (see para. 3 of the summary of the plaintiff's claim marked as bundle "B"). At this juncture, it would be ideal to set out the summary of the plaintiff's claim as per bundle "B" (the relevant parts only):

(1) The plaintiff has at the defendant's request agreed to sell and supply goods to the defendant for the defendant to complete a project known as Contract No: LPJ/643/87 which was awarded by Lembaga Pelabuhan Johor (referring to LPJ) to the defendant.

(2) Pursuant to a Deed of Assignment dated 20.9.89 between the plaintiff and the defendant, and as consented by Lembaga Pelabuhan Johor (referring to LPJ), the defendant has assigned the proceeds of the said contract with the Lembaga Pelabuhan Johor (referring to LPJ) to the plaintiff in consideration of the plaintiff agreeing to supply goods.

(4) Pursuant to a letter dated 29.1.91, the defendant has admitted that it is owing the plaintiff the sum of RM386,273.00.

(5) In 1991, LPJ has terminated the contract with the defendant as the defendant has breached the said contract and as such LPJ no longer owes the defendant any proceeds of the contract. In view of the same, the said Assignment is no longer binding on the plaintiff and the defendant is under an obligation to pay the plaintiff the said sum of RM386,273.00.

(6) Alternatively, the defendant has breached the said Assignment by failing to ensure that LPJ pays the said sum of RM386,273.00 directly to the plaintiff.

(7) Wherefore, the plaintiff claims from the defendant the sum of RM386,273.00

The summary of the defendant's defence styled as "defence in brief" marked as bundle "C" laid emphasis on the deed of assignment. I shall now reproduce them:

1. At all material times the defendant was a contractor for Johor Port Authority (referring to LPJ) under a construction contract relating to works required to be undertaken at Pasir Gudang, Johor.

2. Pursuant to a Deed of Assignment dated 20.9.1989 between the plaintiff and the defendant which was agreed to by LPJ, the defendant assigned proceeds from the said contract to the value of the price of goods ordered by the defendant from the plaintiff for use in the said works. In the said Deed of Assignment, LPJ agreed to pay to the plaintiff directly the price of the goods supplied by the plaintiff.

3. By a letter dated 4 February 1991, LPJ terminated the services of the defendant under the said contract.

4. The defendant contends that notwithstanding that its services had been terminated by LPJ, LPJ is responsible to pay the sum of RM386,273.00 to be paid to the plaintiff. This is because the said goods were supplied before the termination of the defendant's services, and at that point in time, the said Deed of Assignment was still in force and effective.

5. Wherefore, the plaintiff's claim against the defendant is wrong as it ought to be directed at LPJ.

It seems to me that the amount of the claim by the plaintiff in the sum of RM386,273 is not in dispute. The parties agree to this quantum and they submit on it. The only discernible defence advances by the defendant is that it is not liable to pay the plaintiff the sum of RM386,273 by reason of the deed of assignment. The defendant is saying to the plaintiff that the plaintiff should proceed against LPJ in order to recover that sum.

It is now opportune to reproduce the relevant clauses of the said assignment – referring to the deed of assignment. It is bundled up as an agreed bundle marked as "G". Recital (3) of the said assignment is worded in this way:

(3) In order to secure the payment by the Assignor for such Goods to be supplied by the Assignee, the parties hereto have agreed that the Assignor shall assign to the Assignee only such sum payable by LPJ Johor to the Assignor under the principal Contract that represents the value of Goods supplied or to be hereafter supplied by the Assignee.

While cl. 1 of the said assignment reads as follows:

> 1. In consideration of the Assignee agreeing hereby to supply to the Assignor such Goods as may be available and intended for use by the Assignor in the performance of its duties and obligations under the Principal Contract, the Assignor hereby assigns to the Assignee absolutely all such sums payable by LPJ Johor to the Assignor under the Principal Contract to the extent that such sums are sufficient to pay for all moneys due and payable to the Assignee for the Goods so supplied to the Assignor.

Clause 2 of the said assignment is fashioned in this way:

> 2. This Assignment shall be irrevocable and shall continue in force for so long as the Assignor's construction works under the Principal Contract remains uncompleted and for so long as all moneys due and payable by LPJ Johor to the Assignor under the Principal Contract shall remain unpaid to the Assignor or the Assignee as the case may be and lastly for so long as all moneys due and payable by the Assignor to the Assignee in respect of all goods supplied or ordered and in the course of being supplied by the Assignee to the Assignor.

Clause 4 of the said assignment reads as follows:

> 4. It is hereby expressly stipulated that the Assignor shall do all things and acts necessary to ensure that LPJ Johor shall settle and pay directly to the Assignee all moneys due from the Assignor to the Assignee in respect of Goods supplied as hereinabove.

Finally, reference should be made to cl. 5 of the said assignment and it is worded in this way:

> 5. The Assignor shall further take all steps and measures to ensure that LPJ Johor shall make payment of all such moneys as aforesaid upon receipt of invoices and delivery orders in accordance with the prescribed forms 'Delivery Order' and 'Invoice' which shall be delivered by the Assignee to LPJ Johor or its appropriate Department as the case may be and the Assignor hereby authorises LPJ Johor and for itself shall ensure that LPJ Johor shall upon receipt of the abovementioned forms, copied to the Assignor duly pay the Assignee the sums due on the invoices and delivery orders for Goods supplied by the Assignee to the Assignor.

Now, the assignor under the said assignment would refer to the defendant. While the assignee in the said assignment refers to the plaintiff.

Long Shin (DW1) testified that the said assignment were signed by both the plaintiff and the defendant as well as by LPJ. That would make the said Assignment binding on these parties.

Recital (3) of the said assignment is worded in a clear and unambiguous manner. It explicitly explains the purpose of the said assignment and that is merely to "secure the payment by the assignor (meaning the defendant) for such goods supplied by the assignee (meaning the plaintiff)." A book entitled "*A Practical Guide To Legal Drafting – The Indian Draftsman*" by Hargopal carries the following salient write-ups at p. 18:

> Introductory recitals which explain the motive for the preparation and execution of the deed.

and that is exactly what recital (3) of the said assignment has done. It explains everything.

Of pertinence would be these observations. That no where does the said Assignment state that:

(a) the plaintiff has agreed to accept performance solely from LPJ in respect of the payment of the said goods; and that

(b) the defendant would be released from its personal liability to pay the plaintiff the price of the said goods, in particular where LPJ does not pay for the said goods to the plaintiff just like the present case at hand.

In short, the said assignment does not absolve the defendant from its liability to pay for the said goods which had been delivered by the plaintiff. This brings me to s. 42 of the Contracts Act 1950. It is worded as follows:

> 42. Effect of accepting the performance from third person
> When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

The Indian Contract Act has a similar version with out s. 42 of the Contracts Act 1950. In fact, it is word by word similar and it is found in s. 41 of the Indian Contract Act. The commentary by *Pollock & Mulla On Indian Contract And Specific Relief Acts*, tenth edition by Jeevan Lal Kapur is worth referring to. There at p. 413, the learned author has this to say:

> It is in the case of assignment that section 41 applies (*Sri Sarada Mills Ltd v. Union of India* [1966] A.M. 381). What is necessary for application of section 41 is that performance must be by a stranger and in full and not partial (*Chandrasekhara v. Vittala* [1966] A. Mysore 84; *Harchandi Lal v. Sheoraj Singh*, 44 I.A. 60; (1916) A.P.C. 68 followed. (Although the Privy Council did not say in so many words, it meant that contract must be performed in full)). Section 41 does not apply to executory contracts but to contracts which have been performed (*Sri Sarada Mills Ltd v. Union of India* [1966] A.M. 381). A

> agreed to supply timber to B and B assigned the contract to C who received the timber from A. A had received part of the price from B and received another sum from C but not the whole price of timber. In the absence of a contract to the contrary A, it was held, could recover the balance from B (*Chandrasekhara v. Vittala* [1966] A. Mys. 84).

Likewise here, not having been paid the sum of RM386,273 for the said goods, the plaintiff could recover that sum from the defendant. Ian Chin J in *Chong Hee v. Credit Corporation (Malaysia) Berhad* [1999] MLJ U 456 aptly said along the same lines:

> Does the fact of the acceptance by the plaintiffs from a third party of the payment of three instalments as to make the case come within s. 42 of the Contracts Act, 1950 prevent the Plaintiffs from enforcing their rights against the Defendant? Section 42 reads:
>
> > When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promissor.
>
> The application of that section is very much dependent upon the terms of the agreement between the parties. The mere fact of acceptance by the Plaintiffs of the payment of three instalments by a third party cannot by itself attract the application of that section. That payment must be pursuant to an agreement arrived at between the Plaintiffs and the Defendant and it must be pursuant to a term in that agreement that the Plaintiffs would no longer look to the Defendant for payment. There is, as mentioned earlier, no evidence of such an agreement. The witness for the Plaintiff had explained that they accept payment from anyone. In any event there must be performance of the obligation to pay the whole sum due by the third party before s. 42 can apply (see *Scott & English (M) Sdn Bhd v Foo Thor Lombong Bijih Sdn & Anor.* [1985] 1 MLJ 73), which is not the case here, unless the parties have agreed that payment of the three instalments by a third party is sufficient to relieve the Defendant of his obligation to pay the rest which, again, there is no evidence of such an agreement.

In my judgment, a perusal of the said assignment would show that there is no agreement to release the defendant's liability to pay in the event LPJ does not pay. The defendant's liability to pay the plaintiff for the said goods remains intact. That would be the sting of the said assignment.

It is trite law that where the terms of an agreement is unambiguous, the court must give effect to the same without resorting to any extrinsic evidence in order to contradict, vary, add or subtract from its terms. I have said this before and I am saying it once again. Towards this end, I need to quote a passage from the judgment of that brilliant judge in the person of Hashim Yeop A

Sani CJ (Malaya) in the case of *Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164. There his Lordship, in style, had this to say at p. 165 of the report:

> Where the written contracts are clear and unambiguous the court should not go behind the written terms of the contract to introduce or add new terms to it. See also *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229. The respondents did not challenge the validity of the contract on the ground of fraud or want or failure of consideration. What they sought to do was to attempt to establish that when the demand for payment was made to them the appellant had made some fraudulent misrepresentation. In a situation like this the duty of the court is confined to the construction of the written documents and extrinsic evidence is not admissible by virtue of ss. 91 and 92 of the Evidence Act.

Then there is the speech of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280 at p. 281 which merits reproduction. It is phrased in this way:

> In my opinion, the Evidence Act 1950, by section 91 excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by section 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance or in contradiction or in addition or in subtraction of the terms of a document.

In interpreting the said assignment it would be ideal to recall by way of a guidance the speech of Wee Chong Jin CJ Singapore in the case of *Housing & Urban Development Co (Pte) Ltd v. Mah Kok Weng & Anor* [1984] 2 MLJ 16. There at p. 18, his Lordship had this to say:

> In approaching the task of construction of the terms of a written agreement 'the common and universal principle ought to be applied; namely, that an agreement ought to receive that construction which its language will admit, and which will best effect the intention of the parties, to be collected from the whole of the agreement, and that greater regard should be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent' (see *Ford v. Beech* [1848] 11 QB 852, 866; 116 ER 693). And, as no contract is made in a vacuum, in construing a term in a written agreement, a court must always have regard to its commercial purpose and the factual background against which it was made.

It must be recalled that Lai (PW1) has testified during examination in chief, in particular in response to Question 9 of his witness statement, that the plaintiff has never agreed to release the defendant of its liability. Under cross-

examination too, Lai (PW1) has further testified that he has not seen any document to show that the plaintiff has ever agreed to such a release. The notes of evidence at p. 9 carry the following information when Lai (PW1) was being cross-examined:

Question 9 of witness statement read and witness is asked:

> Q: If you were not involved in this transaction how could you answer this question?
>
> A: I have not seen any document to show that the plaintiff ever agreed to release the defendant of its obligations to pay the plaintiff for the goods.

During the cross-examination of Long Shin (DW1), the learned counsel for the plaintiff posed to him the following question:

> Is it stated anywhere in the assignment that the defendant is released from his liability to pay the plaintiff for the goods so supplied?

In answering this question in the affirmative, Long Shin (DW1) relied on p. 2 and p. 3 of the said assignment. The learned counsel for the plaintiff then proceeded to cross-examine Long Shin (DW1) further and p. 13 of the notes of evidence bears this exchange:

> Q: Are there any other documents or correspondences other than the assignment to state expressly that the plaintiff has agreed to release the defendant's liability to pay for the goods so supplied?
>
> A: At page 7 of Bundle 'H', the defendant has instructed LPJ to make payment to the plaintiff."

Now, p. 7 of Bundle 'H' is a letter from the defendant to LPJ dated 28 January 1991 and it is worded in this way:

> Wing Construction (M) Sdn. Bhd.
> PILING SPECIALIST, CIVIL ENGINEERING & GENERAL CONTRACTORS
>
> 28th January 1991
>
> Lembaga Pelabuhan Johor
> Peti Surat 66
> 81707 Pasir Gudang
> Johor
>
> **Attn: Mr. Chow Pun Weng**
>
> Dear Sir

RE: CONTRACT NO: LPJ/643/87
CONSTRUCTION AND COMPLETION OF PALM OIL JETTY AND HAZARDOUS CARGO JETTY EXTENSION AT JOHOR PORT, PASIR GUDANG - ASSIGNMENT OF PAYMENT TO MESSRS T.T. MARTECH SDN BHD

Port Authority to pay the aforesaid company directly for the following materials delivered to site.

SUPPLY AND DELIVER D-TYPE FENDERS AND ACCESSORIES TO PALM OIL AND HAZARDOUS CARGO JETTY EXTENSION.

The amount to be paid for shall be limited to the sum of Malaysian Ringgit: Three Hundred and Eighty Six Thousand Two Hundred and Seventy Three Only (MR386,273.00) still due by us to Messrs T.T. Martech Sdn Bhd and subject to prior approval of the Main Contractor and verified by the Resident Engineer of Sepakat Setia Perunding.

Your prompt action would be deeply appreciated.

Thank you.

Yours faithfully

WING CONSTRUCTION (M) SDN BHD

Sgd: (Illegible)
LONG SHIN
EXECUTIVE DIRECTOR

And it does not say that the plaintiff has agreed to release the defendant from its personal liability to pay the plaintiff the price of the said goods, in particular when LPJ does not pay the plaintiff. Since the plaintiff has not been paid by LPJ, the plaintiff is entitled to claim against the defendant as per this suit.

What then is the effect of the non payment by LPJ to the plaintiff? The answer is not far to seek. It is this. That the said assignment entails the assignment not of a current debt but relates to a future debt and that would be in relation to such sums that become due and payable by LPJ to the defendant. This means that only when LPJ has paid the sum of RM386,270 in full to the plaintiff, would the plaintiff then loses its right to claim directly from the defendant. Thus, for so long as LPJ does not in fact performed ie, pay the said sum of RM386,273 to the plaintiff, the defendant is not in law released from its liability and the plaintiff can still claim the said sum of RM386,273 from the defendant.

The defendant is placed in a precarious position. The defendant has breached the said assignment when the defendant has by its own conduct caused and/or enabled LPJ to terminate the said contract – referring to the contract no: LPJ/643/87. LPJ's letter dated 4 February 1991 addressed to the defendant and marked in the course of the trial as exh. "P1" can be seen in encl. 4 of exh. "LS3" and it is a termination letter and it is worded in this way:

LEMBAGA PELABUHAN JOHOR
JOHOR PORT AUTHORITY
Peti surat 66, 81707 Pasir Gudang,
Johor, MALAYSIA

4 February 1991

Messrs Wing Construction (M) Sdn Bhd
214-216, 1st Floor
Jalan Ipoh
51200 Kuala Lumpur

(ATTN: MR. LONG SHIN)

Dear Sirs,

CONTRACT NO. LPJ/643/87
CONSTRUCTION, COMPLETION AND MAINTENANCE
OF PALM OIL JETTY AND HAZARDOUS CARGO JETTY
EXTENSION AT JOHOR PORT, PASIR GUDANG

Determination of Contractor's Employment

By an agreement dated 7th December 1988 made between us, Johor Port Authority and yourselves as the contractor, it was agreed that you would construct and complete the above works and make good any defects whatsoever to the said above works in conformity in all respects with the provisions of the said agreement and for the consideration therein stated

By clause 51 of the conditions of contract annexed hereto and incorporated with the agreement, the Superintending Officer, Sepakat Setia Perunding (Sdn) was empowered to give to you a notice by registered post dated 6th July 1990 ref: 37725/KL/4058 specifying that you have defaulted by failing to proceed regularly and diligently with the said works. Since you have continued such default for fourteen (14) days after receipt of such notice and/or that you have thereafter repeated such default (whether previously repeated or not) then by clause 3(a)(i) of the same conditions of contract, I, the General Manager of Johor Port Authority, am empowered thereupon by this notice, to determine your employment in accordance with the said clause 51 of this contract effective from the date of this letter

NOW TAKE NOTICE that the said Johor Port Authority acting under the power of clause 51 (c) of the said conditions of contract shall be entitled to repossess the site and exercise all our rights under the same clause.

Dated this 4th day of February 1991.

Yours faithfully,

JOHOR PORT AUTHORITY
Sgd: (Illegible)
(HAJI YAHYA BIN HAJI ABDUL GHANI)
General Manager

The termination letter in exh. P1 as reproduced above is strongly worded. It appears that the defendant has "repeated such default" and as a result thereof, LPJ refuses to pay the defendant or the plaintiff the said sum of RM386.273. The plaintiff has acted wisely and via its solicitors' letter dated 27 August 1996 (see p. 18 of Bundle "H") the plaintiff has terminated the said assignment and with that timely termination the defendant becomes liable to pay the plaintiff the said sum of RM386,273. The plaintiff's solicitors' letter dated 27 August 1996 should be reproduced and I will now reproduce it:

SHUI TAI
ADVOCATES & SOLICITORS
3RD FLOOR, 40C, JALAN SS21/62,
47400 DAMANSARA UTAMA
PETALING JAYA
TEL: 7198906/7198214

27TH August 1996
M/s Chooi & Co
Advocates & Solicitors
Penthouse, Bangunan Ming PH-01
Jalan Bukit Nanas
50250 Kuala Lumpur

Dear Sirs,

Re: Claim Against Wing Construction (M) Sdn Bhd for goods sold and delivered for the Johor Port Authority Project

Our letter dated 22/8/96 refers.

Our client wishes to make clear its stand in this matter:

i) Our client is not bound by the Deed of Assignment dated 20/9/89 in view that the Principal has since 1991 terminated your client's contract and is no longer indebted to it.

ii) Alternatively our client hereby terminates the said Deed of Assignment as your client has failed to fulfil clauses 4 & 5 of same and demands that your client pay our client immediately the sum of RM386,273.00 as stated in our said letter as damages.

Thank you.

Yours faithfully.

It certainly makes for an interesting reading material.

It is the defendant's contention that LPJ's termination was unlawful. That is just a bare contention and it does not hold water. It must be borne in mind that the arbitration claim commenced by the defendant for monies and damages against LPJ has been dismissed. It is argued that the defendant has appealed to the High Court against the arbitrator's decision. But that is not relevant because the appeal has not been decided by the High Court. As it now stands, there is no money due and payable by LPJ to the defendant. It is absurd on the part of the defendant to argue that the plaintiff would have to wait until the defendant has exhausted all avenues of appeal before the plaintiff is entitled to claim against the defendant for the sum of RM386,273. There is no legal authority to support such an argument. It must be borne in mind that the defendant's unsuccessful attempt in the arbitration does not and cannot amount to the defendant doing all things and/or taking all steps to ensure LPJ pays the plaintiff as envisaged in cls. 4 and 5 of the said assignment as reproduced earlier. The reason is quite simple. It is this. The defendant has in the first place conducted itself in such a way that it has given reason for LPJ to terminate the said contract – referring to the contract no: LPJ/643/87. The letter from LPJ to the defendant dated 4 February 1991 marked as exh. "LS3" of encl. 4 as reproduced earlier supports the proposition that the defendant was at fault thereby warranting LPJ to terminate the said contract.

There were three letters emanating from the plaintiff's solicitors to the defendant's solicitors dated 15 February 1996, 8 March 1996 and 28 March 1996 as seen at pp. 8, 9 and 10 respectively of Bundle "H" and all these three letters requested information pertaining to the status of the arbitration proceedings instituted by the defendant against LPJ. Somehow the defendant saw it fit not to reply to these three letters. This just shows the lackadaisical attitude that the defendant adopts towards the plaintiff's claim in the sum of RM386,273.

Even assuming for one moment that LPJ's termination of the said contract was indeed unlawful as contended by the defendant, this does not change the liability of the defendant to repay the plaintiff the said sum of RM386,273

because the said assignment is only in force so long as the defendant's works under the said contract remains uncompleted and for so long as there is still money due and payable by LPJ to the defendant under the said contract. This is clearly stated in cl. 2 of the said assignment as reproduced earlier.

Since LPJ has terminated the said contract, the said assignment is henceforth frustrated and it is not capable – nay impossible, of being fulfilled for the following reasons:

(a) the defendant can no longer continue with the works; and

(b) there is no longer any money left that is due and payable by LPJ to the defendant.

As a result thereof, the said assignment in any event becomes void and the defendant is still liable to pay the sum of RM386,273 to the plaintiff for those goods sold and delivered by the plaintiff to the defendant. This is part and parcel of my judgment and it is recorded as such.

It would be correct to say that the said assignment is by its very nature a contract and hence it is governed by s. 42 of the Contracts Act 1950. To succeed in its defence, the defendant would need to prove that by reason of the said assignment the plaintiff has accepted performance from LPJ to pay on behalf of the defendant. No such proof was forthcoming from the defendant. Be that as it may, since the arbitrator has dismissed the defendant's claim against LPJ, LPJ does not then owe any monies to the defendant and LPJ has in fact refused to pay the said sum of RM386,273 to the plaintiff on behalf of the defendant. As such, there is in fact no performance on LPJ's part. And that being the case, the defendant is not discharged from its liability to pay the plaintiff the sum of RM386,273. It is my considered view and it is part and parcel of my judgment that the defendant's line of defence should fail.

Conclusion

For all these reasons, the plaintiff has succeeded in proving its claim on the balance of probabilities. I must therefore allow the plaintiff's claim in para. 13 of its statement of claim with costs.